

STATE OF NORTH CAROLINA

BEFORE A STATE HEARING REVIEW OFFICER  
FOR THE STATE BOARD OF EDUCATION  
PURSUANT TO N.C.G.S. 115C-109.9

COUNTY OF BUNCOMBE

08 ECD 2971

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Student By her Parent, <i>Mother</i> ,	)	
Petitioner	)	
	)	
v.	)	Amended Decision
	)	
Buncombe County Board of	)	
Education,	)	
Respondent	)	

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This is an appeal of the Recommended Decision issued by Administrative Law Judge Selina M. Brooks on August 17, 2009.

The following records were received for review:

1. A certified copy of the Official Record for Case 08 ECD 2971 issued by the Office of Administrative Hearings containing: Decision, Petition, Orders, Notices, Motions, Written Arguments, Petitioner's Exhibits, correspondence and miscellaneous documents specific to this case.
2. One loose-leaf notebook of Respondent's Exhibits.
3. Four volumes of hearing transcripts.
4. Written Arguments from the Petitioner.
5. Written Arguments from the Respondent.

On October 8, the undersigned Review Officer was informed that Petitioner's exhibits 34-52 were omitted from the official record for this case. The undersigned has received and reviewed Petitioner's exhibits 34-52.

**APPEARANCES**

For the Petitioner, *Student*, by and through her parent, *Mother*.  
*Mother* appeared *pro se*.

For the Respondent, Buncombe County Board of Education:  
Campbell Shatley, PLLC  
K. Dean Shatley, II  
674 Merrimon Avenue, Suite 210  
Asheville, NC 28804

In the interest of privacy, and/or convenience, the following will be used to refer to the parties:

For the child - *Student*  
For Mother - *Mother* or Petitioner  
For Father - *Father*  
For Buncombe County Board of Education - Respondent or LEA

### **PROCEDURAL BACKGROUND**

On behalf of her daughter, *Student*, *Mother* filed a Petition for Due Process with the Office of Administrative Hearings on November 26, 2008. On December 4, 2008, Respondent filed an Objection to the Sufficiency of the Petition. In an Order dated December 11, 2008, Administrative Law Judge Augustus B. Elkins, II decided that the Petition was insufficient and granted *Mother* additional time to file an Amended Petition. In his pre-hearing Order issued on March 3, 2009, Judge Elkins narrowed the issues for the Administrative Hearing to identification, evaluation and placement.

Pursuant to Chapter 115C and 115B of the North Carolina Statutes and the Individuals with Disabilities Education Improvement Act (IDEA) 20 U. S. C. § 1400 et seq., the contested case was heard before Administrative Law Judge Selina M. Brooks in Asheville, North Carolina on May 13, 14, 2009 and June 22, 23, 2009. The issues to be heard, as ordered by Judge Elkins, were identification, evaluation, and placement. (**Note:** This was not a jury trial. This was a formal hearing before an Administrative Law Judge.)

At the request of the Administrative Law Judge and with the agreement of both parties, Respondent presented two witnesses prior to the close of Petitioner's evidence. Petitioner cross-examined both witnesses.

At the close of Petitioner's evidence, Respondent moved for a Directed Verdict. Both parties were allowed to address the motion. Judge Brooks granted Respondent's motion and ended the hearing. Petitioner submitted an Official Appeal Notice on August 26, 2009.

This review is limited to the issues ordered for the hearing: identification, evaluation, and placement.

### **ISSUES**

The issues, as stated in the Administrative Law Judge's decision document, were:

1. Has *Student* been provided an appropriate identification as a student with "Multiple Disabilities" pursuant to NC 1500-2.4(b)(8) and NC 1503-2.5 ?

2. Has Respondent failed to appropriately provide an evaluation for *Student* pursuant to NC 1503-2.4?

3. Has Respondent provided an appropriate placement for *Student* in accordance with NC 1501-1 and NC 1501-3.1?

### **WITNESSES**

For Petitioner	1.	<i>Ms. S.T.</i>
	2.	<i>Ms. P.S.</i>
	3.	<i>J.R.</i>
	4.	<i>Father</i> (Father)
	5.	<i>Ms. J.M.</i>
	6.	<i>Mother</i> (Mother)

For Respondent	1	<i>Ms. N.M.</i>
	2.	<i>Ms. J.B.</i>

### **DOCUMENTARY EVIDENCE**

Petitioner's Exhibits 1 through 52 were admitted. Petitioner's Exhibits 27, 28, 29, 30, and 32 were admitted for the first time at the Hearing session held on May 14, 2009. Respondent's Exhibits 1- 12 were admitted.

### **STANDARD OF REVIEW by the STATE REVIEW OFFICER**

The Individuals with Disabilities Education Improvement Act (IDEA) provides for both a one-tier hearing process and a two-tier hearing process. North Carolina adopted the two-tier system. In the two-tier process, the State Review Officer (SRO) must conduct an impartial review of the findings in the hearing and make an independent decision. NC 1504.-1.15(b) (2) (i) (v)

The standard of review that must be followed by reviewing officers is found in *Board of Education v. Rowley*, 458 U6 (1982). The Supreme Court held that "due weight" shall be given to state administrative proceedings. In *Doyle v. Arlington County School Board*, the Fourth Circuit noted, "by statute and regulation, the reviewing officer is required to make an independent decision..." *Doyle*, 953 F.2d 100 (Fourth Circuit 1991). The Court also held that the state's second-tier review officer must "follow the accepted norm of fact finding." *Doyle*, 953 F.2d at 104. The Fourth Circuit "requires courts to give deference to the findings of the administrative hearing officer" and held "that administrative findings in an IDEA case are entitled to be considered prima facie correct". *Hartmann v. Loudoun County Board of Education*, 118F.3d 996, 1000-01 (4<sup>th</sup> Cir. 1991).

While giving due deference to the findings of the Administrative Law Judge, the State Review Officer must examine the entire record of the hearing and make an independent decision.

Having reviewed the official record of this case, the undersigned Review Officer makes the following:

### **FINDINGS OF FACT**

The Review Officer's Findings of Fact are consistent with those of the Administrative Law Judge.

1. Petitioner *Student* was born on \*\*\*, 2001. At the time the Amended Petition was filed (January 26, 2009), *Student* was eight years old and enrolled in second grade at Elementary School.
2. Respondent is the Buncombe County Board of Education, a local education agency (LEA), required to provide a free appropriate public education to children with disabilities who have been identified according to the mandates of the IDEA. ABC Elementary School is a unit within the Respondent's public school system.
3. *Student* has been identified \*\*, speech, mental retardation. *Student* is non-verbal and non-ambulatory. She is not mute. (P 22)(P 23)(R 8)
4. Since her initial identification as a child with special needs, Respondent has provided *Student* with an Individualized Education Plan (IEP). In October 2008, the IEP Team convened to conduct an annual review of *Student's* IEP and placement. This meeting was in session for approximately three hours. The team was unable complete the review.
5. A second meeting was scheduled for November 24, 2008 with the following in attendance: *Mother* and *Father*, parents; *J.R.*, parent advocate; B.W., principal; J.G., Director of Respondent's Exceptional Children Program; Phyllis Wilson, special education teacher; and Ms. J.B., regular education teacher. (R 1)
6. The purposes for the November 24, 2008 meeting were revision of IEP and change of educational placement. These purposes were noted on the **Invitation to Conference** (form DEC 5) which was signed by the Petitioner on 11/14/08. (R 1)
7. J.G. gave *Mother* a copy of the **Prior Written Notice** document that included Respondent's decision to change *Student's* educational placement from regular to separate. (R1)

8. "Early on" in the November 24<sup>th</sup> meeting, *Mother* announced her intention to file a due process petition. From that point on, *Mother* refused to take part in the meeting. School Officials gave her the opportunity to contribute to the discussion. She chose not to participate. (T II, pp.87-88; pp.114-115)

### **IDENTIFICATION**

9. *Student's* original area of eligibility was "Multi- Handicapped". Petitioner requested that each of *Student's* disabilities be listed individually instead of under the Multi-Handicapped area. She was not aware that the area had been redefined and renamed in November 2007. *Student's* eligibility is in the area of Multiple Disabilities. Petitioner agrees with this identification. (T II, pp.134, 177)

### **EVALUATION**

10. In September 2008, the IEP Team agreed that an evaluation would be appropriate. *Mother* signed the necessary consent forms, thereby allowing the school to perform the evaluation. (*Mother's* response to Proposed Order)

11. Respondent suggested that the Center for Developmental Learning (CDL) conduct the evaluation. CDL specializes in assessment of children with severe and multiple disabilities. *Mother* consented. *Student* was scheduled for evaluation in February. In January, 2009, *Mother* withdrew her consent. At about the same time, CDL informed *Mother* that they could not conduct the evaluation. (T I, pp. 52-53) Parents have the right to withdraw consent at any time. (NC 1500-2.5 (c) (1)).

12. Respondent was prepared to arrange for the evaluation to be conducted by LEA psychologists. Petitioner withheld consent. (T I, pp. 54-55)

13. After Petitioner declined to have LEA psychologists conduct an evaluation of *Student*, Respondent suggested another private psychologist, Dr. Barrie Morganstein of Southeast Psychological Services in Charlotte. Petitioner has not given consent for an evaluation to be conducted by Dr. Morganstein. (T II, pp. 299-300; T III, pp. 158-162)

14. Respondent offered three opportunities for evaluation during the 2008-09 academic year. Petitioner has declined all three.

15. Petitioner is concerned that past evaluations are not accurate indicators of *Student's* abilities because comments contained in the results include statements relative to the challenges posed by *Student's* disabilities and the limitations of assessment instruments. (T III, pp. 251-253) Petitioner is concerned that evaluations will not be "impartial" if paid for by the Respondent. (T III, p. 162)

## **PLACEMENT**

16. *Student* attends school four hours per day. This is an arrangement initiated by *Mother* and agreed to by Respondent. *Mother* gave the following reasons for the shortened school day: *Student* takes a long time to eat; in a lunchroom with “about 80 kids”, she would probably get distracted and not focus on eating; and, the “real thing is that she can’t be sitting for so long”. *Mother* stated that she would consider full day attendance if the school would incorporate *Student’s* “way of moving” so that she could continue her physical development at school. (T III, pp.152-155)

17. Pursuant to NC 1504-1.19, *Student* remained in her regular education placement during the proceedings.

18. During her first two years in elementary school, members of *Student’s* IEP team recommended separate placement. *Mother* “adamantly” disagreed. Due to *Mother’s* opposition, *Student* remained in a regular classroom and received resource services. (T I, pp.192-193)

19. Prior to the October and November meetings, Petitioner was given notice that the IEP team was going to consider a change of placement for *Student* (P 6)

20. At the IEP team meeting of November 24, 2008, Respondent changed *Student’s* placement to “separate”. (R 1) The separate placement provides for interaction with her non-disabled peers in art, music and physical education. (T I, p.52)(T III, p.231)

21. Ms. S.T., a para-professional, is *Student’s* one on one aid at home. In her opinion, *Student* has basic addition and word recognition skills. She did not produce evidence to support her opinion. (T I, pp. 224-226, 257-258) Ms. S.T. did not offer any evidence that separate placement would be an inappropriate placement for *Student*.

22. , a former one on one aid for *Student*, stated that *Student* interacted well with non-disabled peers in the regular classroom. (T II, pp.5-56) Ms. P.S. did not offer any evidence that separate placement would be an inappropriate placement for *Student*.

23. J.R., a child/parent advocate who was present at the October and November IEP team meetings, had no knowledge of *Student’s* academic abilities. (T II, pp.57-118) Mr. Rice’s testimony did not offer any evidence that separate placement would be an inappropriate placement for *Student*.

24. Ms. J.M. began working as a one on one aide with *Student* in July 2008. She described her role in working with *Student* (T III, pp. 253 – 280). Ms. J.M. did not offer any evidence that separate placement would be inappropriate for *Student*.

25. *Student’s* father stated that the IEP team did not value parental input. In his opinion, communication between the IEP team and parents is poor. He thought the

goals for *Student* were “limited”. (T II, pp141-195) *Father* did not offer any evidence that separate placement would be an inappropriate placement for *Student*.

26. *Mother* testified on behalf of the petitioner, *Student*. *Mother* has not shared psychological reports and other information with Respondent because she thought that the results included “low cognitive numbers”. She did not trust the reports to be accurate.

(T III, pp. 162-176)

27. *Mother* admitted that regular education placement is not working. *Mother* does not agree with Respondent’s decision to change *Student*’s placement from regular education to separate. In her opinion, separate placement is an “artificial environment” and “against the natural society.” She does agree that *Student* needs educators with specialized training. She believes that the best placement would be an inclusion setting where there is co-teaching and supports. (T III, pp. 228-232)

28. In the professional opinions of two witnesses for Respondent, separate placement is the appropriate placement for *Student*. Ms. N.M. and Ms. J.B., both employees of the Respondent, testified that most appropriate placement for *Student* is a separate classroom setting with teachers who are trained to work with children with disabilities. (T I, pp. 47, 69,191-193) (T III, pp.300-303)

29. Ms. N.M. is a Program and Placement Specialist with 37 years of experience. She has a bachelor’s degree in elementary education and a master’s degree in special education. With the exception of November 24, 2008, Ms. N.M. has attended every meeting of *Student*’s IEP team since *Student* was in kindergarten. Ms. N.M. manages *Student*’s case file. (T I, pp.31-36)

30. In Ms. N.M.’s professional opinion, *Student* needs a small group setting with few distractions because she is distractable and is “less accurate” in a large group setting. *Student* needs people who are trained to work with her “on developing, not only the prerequisite academic skills, because we do know that she can learn .and she needs to learn these things, but also to develop a communication system that will really tell us what she is thinking. We want to hear from *Student* herself.” (T I, pp. 47-48)

31. *Student* does not have the prerequisite skills needed to be a successful second grader. She is very sociable and very interested in people. She smiles when she sees someone she knows and likes. She has some pre-academic skills but she does not have the skills to be able to do what is expected of second graders. (T I, pp.333-335)

32. Ms. J.B. is *Student*’s second grade teacher. Ms. J.B. has been teaching for seventeen years. She has National Board certification in elementary education and holds a master’s degree in education. (T III, pp. 291- 292)

33. Ms. J.B. testified that she felt that the regular classroom was restricting *Student*’s progress because *Student* was easily distracted by the other children. In her opinion,

the appropriate placement for *Student* is in a special education class with trained special education teachers who can develop *Student's* communication skills "so that we can find out how much she has learned and how much she knows."... "this child knows things. She really does. There's just a treasure chest there to try to figure out how to get in there." *Student* is on a different academic and cognitive level than her second grade peers. (T III, pp. 292-295)

34. Petitioner's exhibits 34-52 were examined in the context of the entire review process. The information presented in these exhibits was similar to that found in the official record as attachments and/or information read into the transcripts. Petitioner's exhibits 34-52 did not offer any evidence that a separate placement would be inappropriate for *Student*.

Based on the Findings of Facts, the undersigned Review Officer makes the following:

### **CONCLUSIONS OF LAW**

1. The North Carolina Office of Administrative Hearings, the Administrative Law Judge and the State Review Officer have jurisdiction with regard to this case pursuant to Chapter 115C and 150B of the North Carolina General Statutes and the Individuals with Disabilities Education Improvement Act. 20 U.S.C. § 1400 *et seq.* and the implementing regulations, 34 C.F.R. Part 300.

2. The Petitioner has the burden of proof by a preponderance of the evidence. *Schaffer v. Weast*, 546 U. S. 49, 62 (2005)

3. The LEA appropriately identified *Student* as a child with multiple disabilities as defined by NC 1500-2.4(a) (1) (b) (8) and the IDEA 20 U.S.C.1401 (3); 1401(30); 34 CFR 300.8; 115C-106.3(1) (2). As a child under theegis of IDEA, *Student* is entitled to a free appropriate public education in the least restrictive environment (FAPE). This means "to the maximum extent appropriate," the LEA must educate children with disabilities with their non-disabled peers. *Id*; 34 C.F.R. §300.114.

4. Respondent has attempted to comply with the regulations set forth for the reevaluation process. Under NC 1503 2.4, the LEA must conduct a reevaluation for each child with a disability at least once every three years.

The LEA cannot be considered noncompliant for failure to reevaluate *Student* when *Mother* refused evaluations by three different licensed psychologists or agencies.

5. Under IDEA, schools are required to develop an IEP for each child with a disability, with parent participation. *Winkelman v. Parma City Sch. Dist.*, 127 S.Ct. 1994, 2000 (2007) (citations omitted.) While parents' concerns must be considered by the IEP team, parents are not entitled to the placement they prefer. *MM v. Sch. Bd. Of Miami-*



*Dade Cnty.* 437 F.3d 1085, 1102 (11th Cir.2006). The educators who develop a child's IEP are entitled to "great deference." *Todd D. v. Andrews*, 933 F.2d 1576, 1581

Except for her opinion, *Mother* failed to present any evidence that the proposed separate placement is inappropriate for *Student*. Petitioner presented no expert testimony, or empirical evidence, to support her position. Petitioner's opinion is insufficient to sustain her burden of proof.

Respondent has provided an appropriate placement for *Student* in accordance with NC 1501-1 and NC 1501-3.1.

Petitioner did not meet her burden of proof by a preponderance of the evidence.

Based on the Foregoing Findings of Facts and Conclusions of Law, the Undersigned Review Officer makes the following:

### **DECISION**

The September 22, 2009 decision of the Review Officer stands. The Final Decision of the Administrative Law Judge is affirmed.

### **NOTICE**

Any person aggrieved by this decision may institute civil action in State court within 30 days after receipt of this decision as provided in N.C.G.S. 115C-116 or file an action in federal court as provided in 20 U.S.C. 1415. Please notify the Exceptional Children Division in writing of such action so that the records for this case can be forwarded to State Court.

This the 12<sup>th</sup> day of October, 2009

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Betty A. Levey, State Review Officer